95-1079

No. _____

Supreme Court, U.S.
FILED
DEC 18 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

GEORGE MEYER,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOANNE F. KLOPPENBURG
Assistant Attorney General
Counsel of Record

JAMES E. DOYLE
Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9227
Attorneys for Petitioner

December 15, 1995

28 pp

QUESTION PRESENTED

1. Whether a non-economic, evenhanded state regulation is subject to, and prohibited by, an irrebuttable presumption of unconstitutionality under the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, solely because it may have an impact on out-of-state commerce.

2. Whether the "effective recycling program" provision of the Wisconsin Recycling Law discriminates against interstate commerce in practical effect, in violation of the Commerce Clause.

3. Whether the "effective recycling program" provision of the Wisconsin Recycling Law imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits, in violation of the Commerce Clause.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. THE DECISION CREATES, AND SUBJECTS STATE REGULATION TO, A NEW COMMERCE CLAUSE TEST NEVER BEFORE ARTICULATED BY THIS COURT. 5

II. APPLICATION OF THE NEW COMMERCE CLAUSE TEST BY THE CIRCUIT COURT FOR STATUTES THAT DO NOT DISCRIMINATE SENDS CONFLICTING MESSAGES AND REQUIRES CLARIFICATION BY THIS COURT. 10

TABLE OF CONTENTS - Continued

Page

III. THE DECISION BROADENS THE BOUNDARIES OF WHAT CONDUCT IS ENCOMPASSED BY THE COMMERCE CLAUSE, IN VIOLATION OF THE LOCAL-NATIONAL DISTINCTIONS DRAWN BY THIS COURT IN *U.S. V. LOPEZ*, THEREBY CHILLING STATE REGULATION. 14

IV. THE DECISION PROHIBITS STATE REGULATION AUTHORIZED BY THIS COURT, ALLOWING PLAINTIFFS TO CIRCUMVENT AN EVENHANDED STATE LAW. 15

V. THE DECISION'S INVALIDATION OF AN EVENHANDED STATE STATUTE UNDER THE NEW THIRD PRONG DIRECTLY CONFLICTS WITH THE EIGHTH CIRCUIT'S APPLICATION OF THE THIRD PRONG TO AN EVENHANDED STATE STATUTE IN *COTTO WAXO CO. V. WILLIAMS*. 19

VI. THE DECISION DEALS A SEVERE BLOW TO RECYCLING IN WISCONSIN AND TO THE RECYCLING INDUSTRY NATIONWIDE. 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES CITED

Baldwin v. G.A.F. Seelig, Inc.,
294 U.S. 511 (1935) 12, 16

Brimmer v. Rebman,
138 U.S. 78 (1891) 13

Brown-Forman Distillers v. N.Y. State,
476 U.S. 573 (1986) 9, 10, 11, 12, 17

C&A Carbone, Inc. v. Town of Clarkstown,
114 S. Ct. 1677 (1994) 6, 16

Chemical Waste Management, Inc. v. Hunt,
112 S. Ct. 2009 (1992) 11

City of Philadelphia v. New Jersey,
437 U.S. 617 (1978) 6, 9, 13, 15, 16, 17, 18

Cotto Waxo Co. v. Williams,
46 F.3d 790 (8th Cir. 1995) 19

Government Suppliers Consolidating
Serv., Inc. v. Bayh,
975 F.2d 1267 (7th Cir. 1992) 13, 17

Great Atlantic Pacific & Tea Co., Inc. v.
Cottrell,
424 U.S. 366 (1976) 8, 11, 13

Hardage v. Atkins,
582 F.2d 1264 (10th Cir. 1978)
and 619 F.2d 871 (10th Cir. 1980) 9

TABLE OF AUTHORITIES - Continued

Page

Hazardous Waste Treatment Council v. State of South Carolina, 945 F.2d 781 (4th Cir. 1991) 16

Healy v. Beer Institute, 491 U.S. 324 (1989) 7, 11, 12

Kassel v. Consolidated Freightways Corp., Etc., 450 U.S. 662 (1981) 9

Maine v. Taylor, 477 U.S. 131 (1986) 7, 8, 9, 16, 17

Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981) 6, 16

Motor Vehicle Manufacturers Association of United States, Inc. v. Abrams, 720 F. Supp. 284 (S.D.N.Y. 1989) 12

Nat. Solid Wastes Manag. v. Alabama Dept. of Envir., 910 F.2d 713 (11th Cir. 1990) 11

National Collegiate Athletic Ass'n v. Miller, 10 F.3d 633 (9th Cir. 1993) 11, 12

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 7, 11, 16, 17

Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3rd Cir. 1987) 17

TABLE OF AUTHORITIES - Continued

Page

Oregon Waste Systems v. Dept. of Env. Quality, 114 S. Ct. 1345 (1994) 17

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 4, 9, 15, 16, 18

SDDS, Inc., v. State of South Dakota, 47 F.3d 263 (8th Cir. 1995) 17

U.S. v. Lopez, 1151 S. Ct. 1624 (1995) 14, 15

West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) 16

CONSTITUTIONAL PROVISION

United States Constitution, Article I, Section 8, Clause 3 ..... i, 2

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 3

Wis. Stat. § 159.07 2

Wis. Stat. § 159.09 2

Wis. Stat. § 159.11 2

No. _____

In The

Supreme Court of the United States

October Term, 1995

GEORGE MEYER,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Defendant George Meyer respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit Court of Appeals which reversed a district court judgment in his favor.

OPINIONS BELOW

The opinion of the court of appeals is reported at 63 F.3d 653 (7th Cir. 1995), *rehearing and rehearing en banc denied.* It is reprinted at App. 1-23. The order denying rehearing is reprinted at App. 24-25. The memorandum and order of the district court on summary judgment is reprinted at App. 26-40, and the memorandum and order of the district court upholding the effective recycling program provision after trial is reprinted at App. 41-48.

JURISDICTION

The decision was issued August 23, 1995. A timely petition for rehearing was filed September 6, 1995. Rehearing was denied September 20, 1995. App. 24-25. This Petition is timely filed. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The provisions of Wis. Stat. §§ 159.07, 159.09 and 159.11 are reprinted in the Appendix at App. 51-62.

STATEMENT OF THE CASE

The Challenged Statute: The Wisconsin Recycling Law bans certain recyclable materials from Wisconsin landfills and incinerators. The purpose of the law is to conserve landfill space by minimizing the amount of recyclable materials in the waste that is disposed of in

state landfills. The law makes several exceptions to the bans, including the "effective recycling program" provision. That exception provides that the ban on waste that contains the listed recyclable materials does not apply to waste from a community that has an effective recycling program, no matter where the community is located. The effective recycling program provision requires that a community design a program to implement and enforce mandatory separation of eleven materials by all residential and commercial entities.

The district court had jurisdiction over plaintiff's challenge to this provision pursuant to 28 U.S.C. § 1331.

The Evidence at Trial: The Wisconsin Recycling Law was designed to keep recyclable materials out of Wisconsin landfills by keeping recyclable materials out of the waste disposed of in Wisconsin landfills, including waste from in- and out-of-state. Approximately 25 percent of the out-of-state waste that is disposed of in Wisconsin landfills is non-municipal waste that does not contain the banned recyclable materials and is therefore unaffected by the law. The plaintiffs who own landfills in Wisconsin and haul waste from in and outside Wisconsin, could not certify that any of the remaining 75 percent would not contain any of the banned recyclable materials.

Of the out-of-state communities that use plaintiffs' Wisconsin landfills, about 20 send waste both to Wisconsin and their own states. In order for most of these communities to comply with the Wisconsin law, they need to pass an ordinance or modify an existing ordinance, add some materials to be recycled, and modify their educational materials. Adoption of an effective recycling program would save money for these communities, generators of waste in the communities, and plaintiff haulers. For most of these communities, the only burden they identified as precluding adoption of an effective recycling program was the burden resulting from

the siting and rulemaking requirements, which were invalidated by the district court.

The evidence at trial established that no other alternative will remove as many recyclable materials from the waste stream, that the minimization of recyclable materials in the waste stream will not be achieved without a mandatory, community-wide and community-enforced, commercial and residential recycling program that comprises an effective recycling program, and that such a program has at most a trivial, and not economically adverse, impact on out-of-state commerce.

The Decisions Below: The district court in its first decision ruled that the effective recycling provision is an evenhanded regulation subject to the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) balancing test. App. at 30-36. The court held a trial to produce evidence as to the nature and extent of the burdens imposed and the benefits served by the provision, and the efficacy of alternatives. App. at 36-37.

After trial, the court found that the evidence showed that the effective recycling provision imposes at most a minimal, administrative burden on out-of-state communities, with little or no additional cost to the communities or the generators within those communities, and substantial benefits accruing as a result of the provision. App. at 43-46. The court also found no evidence to show that a substantial amount of interstate commerce will be impacted in any way by the provision. App. at 43-46. Finally, the court found that the evidence showed that the effective recycling program "is likely to result in the removal of the greatest amount of recyclable materials from the waste stream." App. at 46. The court concluded that the balance weighed in favor of Wisconsin and upheld the provision. App. at 47.

Ignoring these findings and speculating as to the impact of the effective recycling provision, the court of appeals reversed, ruling that what is tantamount to an irrebuttable presumption of unconstitutionality should have been applied solely because the provision regulates the conduct of generators outside Wisconsin, without finding that any economic disadvantage results from that regulation. App. at 11-29. The court of appeals also ruled that the provision's out-of-state reach also invalidated it under the strict scrutiny and balancing tests. App. at 19-23.

REASONS FOR GRANTING THE PETITION

I. THE DECISION CREATES, AND SUBJECTS STATE REGULATION TO, A NEW COMMERCE CLAUSE TEST NEVER BEFORE ARTICULATED BY THIS COURT.

The effective recycling provision of Wisconsin's Recycling Law is designed to reach all waste destined for Wisconsin, regardless of its origin, and the decision of the court of appeals properly found that it does. The decision improperly isolates the nature of the law's out-of-state reach to create a new independent Commerce Clause test never articulated before by this court.[1]

The evidence at trial showed that the effective recycling program provision's aim at waste destined for

---

[1]Furthermore, as shown below, the decision compounds its radical departure from this court's directives by basing the new test on a state law's out-of-state impact even if that impact is not economic and without any evidence of economic harm, thereby taking the "commerce" out of the Commerce Clause prohibition against protectionist state regulation.

Wisconsin indirectly affects waste that does not enter Wisconsin, and that that effect is minimal and economically neutral. It is that incidental impact on non-Wisconsin generators that do not use Wisconsin landfills that prompts the creation in the decision of a draconian third Commerce Clause analysis independent of the traditional two-tiered test set forth repeatedly by this court. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978). This new analysis is extrapolated from the cases that deal with reciprocity requirements and price affirmation statutes, even though these cases are merely subsets of the set of cases concerning regulations whose purpose is economic protectionism and to which heightened scrutiny applies. The decision's carving out of dicta about regulation of commerce in other states independent of any concern with economic discrimination violates the case law of this court.

The decision's new test based solely on the out-of-state reach of a law is directly to this court's decision in *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981). *Minnesota v. Clover Leaf* shows that a state statute's control of out-of-state commerce cannot practically, alone, be the distinction, because such a distinction would clear the field of any state regulation at all. A ban on the sale of milk in plastic containers was upheld in *Minnesota v. Clover Leaf Creamery*, 449 U.S. at 456, even though that ban controlled the out-of-state use of plastic to bottle milk (burdening not only sales in Minnesota but all sales to the extent multi-state dealers were required to set up new or separate production lines).[2]

---

[2]No law was needed to enforce the ban, because it is clear whether milk is or is not in plastic. Here, the mandatory ordinance is necessary to minimize recyclable materials in

(continued...)

The decision's isolation of a new category of invalid non-economic regulations is also contrary to the decision in *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989), and its fellow price affirmation statutes. Unlike the statute struck down in *Healy*, the Wisconsin effective recycling program applies equally to interstate and in-state waste generators. Equal treatment was not the goal in *Healy*; the goal was to shield in-state merchants and consumers from the competitive advantage enjoyed by business and consumers in other states. 491 U.S. at 340. Also, unlike the statute in *Healy*, the effect on the proportionately small amounts of municipal out-of-state waste destined for Wisconsin landfills is not sufficiently "significant" to trigger a *Healy*-type analysis. Whereas the Connecticut law wholly supplants the out-of-state market for beer, *Healy*, 491 U.S. at 339, the effective recycling program at the most takes away one option for waste disposal from some communities and the generators in them, or requires residential and commercial recycling.

The record establishes as undisputed that the whole point of the nondiscriminatory Wisconsin scheme is that waste from communities without effective recycling programs is different from waste from communities with such mandatory, comprehensive programs because it will on average contain larger proportions of recyclable materials. It is because of this difference in the nature of the waste that the reciprocity cases cited in the decision, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269

---

[2](...continued)
waste, because such objective verification is not available. Moreover, because the record shows that the production line (generation of waste) cannot be split (some recycle and some don't) and the quality of the waste maintained, the resulting inferior product requires that this court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), be followed. *See* footnote 3 below.

(1988), and *Great Atlantic Pacific & Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976), do not apply.[3]

In each of the reciprocity cases the standard set by the importing state is a subterfuge for protecting in-state producers or consumers, and is directed at the origin of the products without regard to their nature. Regulating based on whether waste is from a community with an effective recycling program is a legitimate nondiscriminatory proxy for regulating based on what is in that waste in terms of proportion of recyclable materials. The key is how effectively the waste generator diverts recyclable materials from waste, and the record shows that generators in communities without an effective recycling program are likely to divert a smaller proportion of recyclable materials than in communities with an effective recycling program. The record establishes as undisputed that waste from communities with effective recycling programs will on average and as a whole contain lower proportions of recyclable materials than waste from communities without effective recycling programs.[4]

---

[3]It is also because of this substantive difference that the analysis in *Maine v. Taylor* does apply. In that case, the record established that out-of-state baitfish had a parasite that the Maine fish did not, 477 U.S. at 141, and Maine proved that only a complete ban would keep its fish untainted. This court's affirmation of Maine's law resulted from this court's review of the record showing that out-of-state baitfish were in fact different from Maine fish. Here, the record similarly establishes conclusively that there is a substantive difference between a ton of waste from a community with, and a ton of waste from a community without, an effective recycling program, and that there is no better way to protect Wisconsin from the latter.

[4]The decision's disregard for these and other facts in the record, and its substitution of its speculation for those facts, are

(continued...)

Conversely, in *Hardage v. Atkins*, which the decision analogizes as most similar to this case, Oklahoma did not care what was in the hazardous waste entering its facilities; it was concerned only about what state the waste came from. *Hardage v. Atkins*, 582 F.2d 1264, 1266 (10th Cir. 1978) and 619 F.2d 871, 873 (10th Cir. 1980) (waste subject to higher or different standards prohibited even if safe). In addition, if there were objective standards that Oklahoma could apply in *Hardage*, there is no reason why Oklahoma could not have simply imposed those standards on all waste disposed in-state. Here, by contrast, the record establishes that no such standards are yet available.

All of these essential distinctions notwithstanding, because Wisconsin's law will in some communities affect generators of waste that never enters Wisconsin, the decision seizes dicta about regulating commerce in other states, from cases concerning purely protectionist state laws, to create a new, third prong of the Commerce Clause test. The decision uses that new test to invalidate the Wisconsin law even though the impact on non-Wisconsin waste is minimal, even though the decision finds no demonstrated economic harm on the out-of-state waste generators that may be subject to that impact, and even though the law is not driven by any economic intent or invalid motive. The decision prohibits Wisconsin from treating waste evenhandedly, even though this court has directed that states do just that in order to avoid the dormant Commerce Clause barriers. In short, the

---

[4](...continued)
also contrary to this court's directives. *See City of Philadelphia v. New Jersey*, 437 U.S. at 623; *Brown-Forman Distillers v. N.Y. State*, 476 U.S. 573, 579 (1986); *Maine v. Taylor*, 477 U.S. at 145-46; *Pike v. Church*, 397 U.S. at 142; *Kassel v. Consolidated Freightways Corp., Etc.*, 450 U.S. 662 (1981) and its predecessor cases concerning regulation of trucks and trains.

decision creates a new Commerce Clause test never articulated by this court. This petition should be granted to enable this court to undo this radical revision of Commerce Clause jurisprudence.

II. APPLICATION OF THE NEW COMMERCE CLAUSE TEST BY THE CIRCUIT COURT FOR STATUTES THAT DO NOT DISCRIMINATE SENDS CONFLICTING MESSAGES AND REQUIRES CLARIFICATION BY THIS COURT.

By creating an irrebuttable presumption contrary to traditional Commerce Clause analysis at a time when this court has begun to rein in the scope of the Commerce Clause, the appeals court decision throws into great doubt what the law actually is. Prior to this decision, Commerce Clause cases were subject to one of two standards of review. A particular balancing test is associated with each of these standards, dividing burdens of proof between the plaintiff and state according to whether the situation warrants heightened or lesser scrutiny.

This decision creates and applies a third standard, extrapolated from cases involving statutes that blatantly effect some form of economic protectionism. Those statutes offend profoundly the underlying purpose of the Commerce Clause--to strike a balance between maintaining an economic union and preserving state autonomy--and are not at all like the evenhanded, non-economic effective recycling provision. Only where there is no purpose unrelated to economic protectionism, will a state regulation be struck down. *See Brown-Forman Distillers v. N.Y. State Liquor Authority*, 476 U.S. 573, 578-79 (1986).

It is the underlying intent to favor in-state interests that doomed those statutes, known as extraterritorial and reciprocity laws, and that distinguishes those laws from Wisconsin's effective recycling program. Lofty language about extraterritorial reach notwithstanding, where the court invalidated the means, the court detected invalid ends. *See, e.g., Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2016 (1992); *National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993); *Healy v. Beer Institute*, 491 U.S. at 326 (statute discriminates on its face against interstate commerce and was passed to keep Connecticut residents from crossing state lines to purchase beer at lower prices); *Brown-Forman Distillers v. N.Y. State*, 476 U.S. at 580.

In the reciprocity cases, the regulations are knocked down because they seek to keep out products solely because those products are from other states, either to gain economic advantage for their own products in those other states or to lower the burdens on in-state interests at great cost to the out-of-state goods. *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. at 375, 380-81 (requirement that milk from another state may be sold in Mississippi if the other state accepts milk from Mississippi on a reciprocal basis acts to ban good milk from Mississippi and to gain access to other state markets for Mississippi milk); *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 279-80 (regulation that awards sales tax credit for ethanol if produced in Ohio or in a state that grants a similar tax advantage to ethanol produced in Ohio constitutes plain discrimination against out-of-state products to gain favorable tax treatment for Ohio-produced ethanol); *Nat. Solid Wastes Manag. v. Alabama Dept. of Envir.*, 910 F.2d 713, 720 (11th Cir. 1990) (Alabama statute that prohibits hazardous waste from other states that bar hazardous waste themselves discriminates on its face against hazardous waste based solely on its origin). The bottom line for these cases is

identical to that for the traditional Commerce Clause analysis articulated above: the only legitimate basis for a discriminatory regulation is the nature of the product itself.

In the price affirmation cases, the regulations are invalidated because they discriminate on their face in order to give local merchants and consumers an economic advantage and control *prices* in other states. *Brown-Forman Distillers*, 476 U.S. at 580 (sellers of liquor to wholesalers in New York must sell at price no higher than lowest price charged wholesalers elsewhere in the country); *Healy v. Beer Institute*, 491 U.S. at 337, 340 (out-of-state shippers of beer to Connecticut wholesalers must sell at price no higher than prices in bordering states); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (out-of-state milk cannot be sold at less than minimum price for in-state milk; plaintiffs' assertion that this is not a case about setting prices is false).

The effective recycling program provision is not like any of these regulations: it is not facially discriminatory, it is not motivated by and does not effectuate economic protectionism, it does not seek economic advantage for in-state interests or set up barriers to out-of-state trade, and it does not extend Wisconsin's enforcement arm into other states (enforcement takes place when waste enters a landfill or incinerator), *see*, *Motor Vehicle Manufacturers Association of United States, Inc. v. Abrams*, 720 F. Supp. 284, 288 (S.D.N.Y. 1989) (notice provision of New York lemon law cannot be enforced in other states). Nor is it at all like the Nevada statute in *National Collegiate Athletic Ass'n. v. Miller*, 10 F.3d at 633, which required the NCAA to give Nevada colleges and athletes greater procedural protection than provided in NCAA rules, thereby forcing Nevada's requirements on NCAA's dealings in all other states. That statute was directed only at interstate commerce, 10 F.3d at 638, at no cost to Nevada and great cost to the NCAA. The effective

recycling program component of Wisconsin's recycling law affects commerce both intrastate and interstate, and burdens both in-state and out-of-state interests equally.

The decision takes the dicta in these cases about affecting policies in other states or regulating commerce in other states too far--any evenhanded regulation, such as the limit on tonnage of waste suggested in *City of Philadelphia v. New Jersey*, 437 U.S. at 617, or the ban on recyclable and other materials in the Wisconsin law, do both. "Practical considerations, however screened by doctrine," must control a commerce clause analysis. *Great Atlantic & Pacific Tea Company, Inc.*, 424 U.S. 372 n.6 (citation omitted). If the object of the effective recycling program had been to keep out all out-of-state waste from Wisconsin, it will not happen. *Government Suppliers Consolidating Serv., Inc. v. Bayh*, 975 F.2d 1267, 1278 (7th Cir. 1992), citing *Brimmer v. Rebman*, 138 U.S. 78 (1891).

The decision's application of the analysis in the extraterritoriality and reciprocity cases independently to the effective recycling program provision sends a confusing message to other circuit and district courts as to the proper test to be applied to non-economic evenhanded regulations, and to regulations totally devoid of any purpose related to economic protectionism. This court must grant this petition to clarify what the test for a statute that does not discriminate should be.

III. THE DECISION BROADENS THE BOUNDARIES OF WHAT CONDUCT IS ENCOMPASSED BY THE COMMERCE CLAUSE, IN VIOLATION OF THE LOCAL-NATIONAL DISTINCTIONS DRAWN BY THIS COURT IN *U.S. V. LOPEZ*, THEREBY CHILLING STATE REGULATION.

As Justice Rehnquist cautions in *U.S. v. Lopez*, 1151 S. Ct. 1624 (1995), the appeals court has used the Commerce Clause to go beyond activity that "substantially affects" interstate commerce. The decision has taken an evenhanded regulation with no demonstrated economic impact on interstate or out-of-state commerce and invalidated that regulation because it may affect out-of-state behavior. The decision's creation of a new Commerce Clause test erases any distinction between what is truly national and what is truly local, *U.S. v. Lopez*, 1151 S. Ct. at 1634, and leaves states uncertain as to the real reach of the Commerce Clause.

Damage to legal certainty and precision combined with the specter of other courts following this decision will have a chilling impact on the ability of states to regulate, particularly matters related to safeguarding public health and the environment. The decision will have that impact because it creates a powerful, flexible, relatively easy-to-use tool for any entity seeking to eliminate a regulation perceived as particularly burdensome.

An irrebuttable presumption of unconstitutionality that does not require a plaintiff to show a discriminatory economic motive or effect is powerful because its result is to invalidate a law or regulation passed by a democratically elected legislature. The decision's analysis is flexible because any evenhanded regulation affects, to some extent, policies or commerce in other states (particularly in this era of electronic and instantaneous

commercial transactions), and therefore the analysis can be followed to relieve any activity from state regulation. The decision creates a relatively easy-to-use method of eliminating an objectionable law by applying a less rigorous standard of proof than the other two prongs of the traditional test, while affording a state no opportunity to show that competing in-state concerns, or the absence of reasonable alternatives, or the absence of economic discrimination, should save the law.

The decision tips the federal-state balance of commercial power in the opposite direction of *U.S. v. Lopez*. This court should grant this petition in order to restore that balance and remove the decision's threat to states' evenhanded attempts to regulate.

IV. THE DECISION PROHIBITS STATE REGULATION AUTHORIZED BY THIS COURT, ALLOWING PLAINTIFFS TO CIRCUMVENT AN EVENHANDED STATE LAW.

The decision creates a new third non-economic prong to the two-tiered Commerce Clause test and subsumes the existing two tiers under that third prong, violating the principles long established by this court. By subsuming those principles under a facial inquiry into the speculated effect of a state statute on commerce outside that state, and creating an effect-based version of the *Pike v. Church* balancing test, the decision prevents states from doing what this court has expressly authorized, which is to regulate evenhandedly. *Pike v. Bruce Church, Inc.*, 397 U.S. at 137; *City of Philadelphia v. New Jersey*, 437 U.S. at 626. Moreover, the decision imposes such a draconian test without any finding of economic harm.

It is axiomatic that the Commerce Clause prohibits only economic protectionism and trade barriers. *City of*

Philadelphia v. New Jersey, 437 U.S. at 623-24. *See also, Hazardous Waste Treatment Council v. State of South Carolina*, 945 F.2d 781, 789 (4th Cir. 1991) (citing *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 273-4) (Commerce Clause "directly limits the power of the states to discriminate against interstate commerce" and "prohibits economic protectionism--that is regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors"); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 471-72 n.15 (Commerce Clause prohibits economic protectionism, having either discriminatory effect or purpose); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2215 (1994) (state law must be trade barrier and discriminate to violate Commerce Clause); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (chief purpose of Commerce Clause was to prevent customs barriers and other economic retaliation). The decision violates this court's precedent by striking down a state law that constitutes neither.

This court has prescribed the application of one of two analyses to a dormant Commerce Clause claim. The first is applied to a regulation that clearly discriminates against interstate commerce, and the inquiry is whether the discrimination is justified by a valid factor unrelated to economic protectionism. This review, known as heightened scrutiny, amounts to a "virtual per se rule of invalidity." The second is applied to a statute that regulates evenhandedly, with only incidental impact on interstate commerce, and the inquiry is whether that impact is clearly excessive in relation to local benefits. This review, known as the *Pike* balancing test, examines the nature of the local interest and whether that interest could be promoted as well with lesser impact on interstate commerce. *C&A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. at 1682 (1994); *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *City of Philadelphia v. New Jersey*, 437 U.S. at 623-24; *Pike v. Bruce Church Inc.*, 397 U.S. at 142.

Under the first and more strict test, the plaintiff has the burden of showing discrimination, either on the face of the statute or in practical effect, and the state has the burden of showing that the statute serves a legitimate local purpose which could not be served as well by nondiscriminatory means. *Maine v. Taylor*, 477 U.S. at 138. Under the second balancing test, the burden is on the plaintiff to show the impact on interstate commerce is overly oppressive. *Id.*

Discrimination as used to describe a regulation that must undergo heightened scrutiny has been defined by this court to mean "differential treatment of in-state and out-of-state economic interests that benefits the former *and* burdens the latter." *Oregon Waste Systems v. Dept. of Env. Quality*, 114 S. Ct. 1345, 1350 (1994) (emphasis added); *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 273. A statute discriminates if its effect is to favor interstate economic interests over out-of-state economic interests. *Government Suppliers*, 975 F.2d at 1278; *Brown-Forman Distillers*, 476 U.S. at 579; *SDDS, Inc., v. State of South Dakota*, 47 F.3d 263, 271 n.12 (8th Cir. 1995) (state action must discriminate to violate Commerce Clause; discrimination exists where state action exports costs to out-of-staters). Facially evenhanded legislation is discriminatory in practical effect only where the state law advantages in-state activities relative to out-of-state activities in the same market. *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 402 n.19 (3rd Cir. 1987). Discrimination must mean some form of economic protectionism. *City of Philadelphia v. New Jersey*, 437 U.S. at 623-24.

The effective recycling program provision does not discriminate because it neither imposes undue burdens on out-of-state commerce nor favors the interests of in-state commerce. That the effective recycling program component may indirectly affect waste that never enters Wisconsin at the same time that it addresses waste that

is sent to Wisconsin does not suffice to show an improper burden on interstate commerce. Moreover, because non-Wisconsin generators of waste disposed of in Wisconsin share the interest of Wisconsin generators of waste dumped in Wisconsin in conserving Wisconsin landfill capacity, the effective recycling program component promotes in- and out-of-state interests equally--the program saves landfill capacity for waste no matter what its origin.

Because the effective recycling program provision is not discriminatory, as defined by this court in the cases cited above, it must be subjected to the *Pike v. Church* balancing test. The record at trial established, and the district court found, that the Wisconsin law has little effect at all on interstate commerce and no economically adverse effect on out-of-state commerce. App. at 43-47. By contrast, the benefits flowing from the law are substantial.[5] The resulting overwhelming balance in favor of the recycling law reflects, and confirms, its nondiscriminatory nature.

In sum, it is the discrimination against interstate as opposed to intrastate movement of goods, rather than the restriction of interstate activity per se, that triggers heightened scrutiny. *See, City of Philadelphia*, 437 U.S. at 626 (it would be permissible to protect the environment by slowing all waste into New Jersey landfills). Wisconsin

---

[5]The district court found those benefits to include: "Conserving landfill space, reducing the risk of environmental contamination and remediation costs by siting fewer new landfills, reducing the risk of environmental contamination and remediation costs from landfilling certain listed recyclable materials, conservation of raw materials and natural resources, conservation of energy and resources used to manufacture products from raw materials rather than from recyclable materials and stimulation of new markets and technologies for recyclable materials." App. at 46.

has chosen to slow all waste into its landfills by minimizing the amount of recyclable materials in the waste it accepts, and the mechanism for achieving that minimization applies equally in and out of state. Because the burdens imposed by that mechanism on interstate and out-of-state commerce are minimal and benign, and because the benefits served by that mechanism are substantial, the Wisconsin law does not offend the Commerce Clause. This court should grant this petition to restore to states the authority to regulate evenhandedly.

V. THE DECISION'S INVALIDATION OF AN EVENHANDED STATE STATUTE UNDER THE NEW THIRD PRONG DIRECTLY CONFLICTS WITH THE EIGHTH CIRCUIT'S APPLICATION OF THE THIRD PRONG TO AN EVENHANDED STATE STATUTE IN *COTTO WAXO CO. V. WILLIAMS*.

If this court decides to countenance the circuits' creation of an independent third Commerce Clause test, it must nevertheless clarify the application of that test to evenhanded state regulation. The decision in *Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995), holding that Minnesota's ban on the sale of petroleum-based sweeping compounds in Minnesota does not have an improper extraterritorial reach, directly conflicts with this decision's invalidation of the equally evenhanded Wisconsin Recycling Law. Footnote 10 of this decision notwithstanding, App. 19, it is precisely the Seventh Circuit's distinct analysis of the issue of extraterritoriality that subsume the traditional Commerce Clause analyses and strikes down Wisconsin's law.

VI. THE DECISION DEALS A SEVERE BLOW TO RECYCLING IN WISCONSIN AND TO THE RECYCLING INDUSTRY NATIONWIDE.

The practical effect of the decision is to construe a statute whose purpose is to let in waste that keeps out recyclable materials, so as to let in waste that keeps in recyclable materials. If a hauler can show that a load of waste contains no recyclable materials, that waste is allowed in Wisconsin landfills. Plaintiffs never offered to show that the 75 percent of out-of-state waste that is non-industrial waste does not contain recyclable materials. The decision allows plaintiffs to circumvent the Wisconsin ban on recyclable materials and to eliminate the Wisconsin recycling law as it applies to out-of-state waste. The waste industry does not have a vested right to an unregulated market, and the Commerce Clause should not be used as the vehicle for getting around Wisconsin's ban on recyclable materials.

To the extent that out-of-state waste can circumvent Wisconsin's Recycling Law, pressures will mount to dilute if not unravel the in-state recycling program established under that law. The environmental benefits of the effective recycling program provision will be lost. More significantly for interstate commerce, the record at trial showed that the national recycling industry depends on the stable supply of recycling markets assured by the effective recycling program component of Wisconsin's law. The growth of that industry, and the continued development of recycling technology, are compromised by this decision's invalidation of that component. This court should grant this petition to undo that direct threat to interstate commerce in recycling.

CONCLUSION

This petition for certiorari review should be granted for the reasons state above.

Respectfully submitted this 15th day of December, 1995.

JOANNE F. KLOPPENBURG
Assistant Attorney General
Counsel of Record

JAMES E. DOYLE
Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9227
Attorneys for Petitioner

December 15, 1995